Supreme Court, U.S.
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NO.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2001

RICHARD BOLTE,

Petitioner,

v.

CAROLE KOSCOVE,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE COLORADO SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Does a state court's exercise of jurisdiction over issues exclusively within the jurisdiction of the federal courts under 28 USC § 1654 violate the Supremacy Clause of the U.S. Constitution, Article VI?

II. Did the Colorado state courts in this case apply Colorado statutes, in themselves constitutional, in a manner repugnant to and incompatible with the Constitution and federal laws?

LIST OF PARTIES

The caption identifies the only parties in this case -- petitioner Richard Bolte and respondent Carole Koscove.

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Petitioner Richard Bolte (Bolte) respectfully prays that a writ of certiorari issue to review the decisions of the Colorado Supreme Court and the Colorado Court of Appeals.

OPINIONS BELOW

The opinion of the District Court for El Paso County, Colorado is unreported and is reprinted in the appendix. (A-12 to A-19). The decision of the Colorado Court of Appeals affirming the district court, entered February 15,

2001, is reported as *Koscove v. Bolte*, 30 P.3d 784 (Colo. App. 2001). (A-3 to A-11). The Colorado Supreme Court issued an order granting Bolte's petition for a writ of certiorari on August 20, 2001; however, the review was limited to a single issue: "Whether admission to a court *pro hac vice* protects the admitted attorney from claims of unauthorized practice of law only for the period of time following the *pro hac vice* admission." (A-2). With the exception of Justice Kourlis, the court denied review as to all other issues. Justice Kourlis would have granted review as to "(w)hether a Colorado state court has jurisdiction to hear a claim of unauthorized practice of law, when the alleged conduct took place solely within the federal courts, but under state law claims." (*Id*).

JURISDICTIONAL GROUNDS

This petition arises from the August 20, 2001 order of the Colorado Supreme Court in which that court accepted this case for purposes of limited certiorari review. As noted above, the review was limited a single issue. The Colorado Supreme Court will not consider whether the Colorado state courts' exercise of jurisdiction over Koscove's claims of unauthorized practice of law arising from Bolte's participation *pro hac vice* in her federal action in Colorado violated the Supremacy Clause of the United States Constitution. Thus, the highest court in the State of Colorado has rendered a final judgment on that issue and this Court has jurisdiction pursuant to 28 U.S.C. § 1257(a). *Calder v. Jones*, 465 U.S. 783, 788 n.8 (1984); *Shaffer v. Heitner*, 433 U.S. 186, 195-96 n. 12 (1977); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 484-485 (1975).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Article of the U.S. Constitution, Section 10, Clause 1, in pertinent part provides:

> No state shall ... pass any ... Law impairing the Obligation of Contracts . . . .

The Fourth Article of the U.S. Constitution, Section 2, Clause 1 provides:

> The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

The Sixth Article of the U.S. Constitution, Clause 2, in pertinent part provides:

> This Constitution, and the Laws of the United States ... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Fourteenth Amendment to the U.S. Constitution provides in pertinent part as follows:

> . . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. . .

The statute granting the Supreme Court appellate jurisdiction over state court decisions on federal questions, 28 U.S.C. § 1257(a), provides:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any state is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

The statute granting exclusive control of *pro hac vice* admissions in federal courts, 28 U.S.C. § 1654, provides:

> In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein.

The local federal rule governing Bolte's *pro hac vice* admission was D.C. Colo. L.R. 83.5, which provides:

> A. APPLICANT INFORMATION
> An applicant for admission to the bar of this court must be a person of good moral character licensed by the highest court of a state, federal territory or the District of

Columbia where a written examination was required for admission and be a member of the bar in good standing in all courts and jurisdictions where he or she has been admitted. Each applicant for admission shall complete an approved form provided by the clerk. Each applicant shall pay to the clerk of court such fee as is prescribed by General Order of Court.

B. ENTRY OF APPEARANCE
An attorney's entry of appearance by signing a pleading, motion, or other paper does not constitute entry of appearance by that attorney's firm.

C. CONSENT TO JURISDICTION, FAMILIARITY WITH LOCAL RULES
An attorney who applies for admission to the bar of this court: (1) consents to this court's exercise of disciplinary jurisdiction over any alleged misconduct; and (2) certifies familiarity with the local rules of this court.

STATEMENT OF THE CASE

In November 22, 1994, Bolte and Carole Koscove (Koscove) entered into a written contract for services. Pursuant to that agreement, Bolte was to "investigate and verify the accuracy of . . . royalty payments" due Koscove from the ARCO Oil Company arising from her ownership of land in southern Colorado. (A-20 to A-21). At that time, Bolte was, and Koscove knew him to be, an out-of-state attorney licensed in Wisconsin but not in Colorado. Bolte's

status was irrelevant to the parties because the contract did not require Bolte to perform legal services. The contract did not refer to Bolte as Koscove's attorney, or as an attorney at all, and Bolte did not sign the agreement as an attorney.

Bolte commenced work under the contract and uncovered many facts supporting Koscove's claim. He then advised Koscove to retain counsel licensed in Colorado to pursue her claim, which she did. Bolte turned the results of his investigation over to Attorney George Mueller (Mueller) and subsequently worked with Mueller to define and develop Koscove's claim against ARCO. When the Koscove/ARCO litigation began in the United States District Court for the District of Colorado, Mueller appeared as Koscove's attorney. Later, upon Koscove's motion, Bolte was admitted to appear before that court *pro hac vice*.

In March 1996, ARCO made a partial payment to Koscove of $1.9 million on her claim, with litigation to continue over any remaining balance due. Koscove in turn paid Bolte $300,000 under the percentage provisions of their agreement. Not long thereafter, Koscove directed Bolte to withdraw as one of her attorneys in the federal action and commenced a lawsuit against him in state court venued in the District Court for El Paso County, Colorado. Koscove's suit sought to recover all funds paid to Bolte and to avoid her future obligations under the contract. She never alleged Bolte's nonperformance under the contract, nor did she allege malpractice, contract loss or damages.

Koscove's complaint alleged no specific facts and instead generally alleged that Bolte performed unspecified services in Colorado which constituted the unauthorized practice of law. On that basis, Koscove alleged that the contract was illegal under three different Colorado laws,

entitling her to the return of all monies paid or to be paid under the contract. (*Id*). Koscove presented no experts before or at trial to substantiate her claim. Her evidence of Bolte's alleged unauthorized practice was limited to the fact that Bolte had prepared factual summaries and proposed pleadings with or for Mueller in anticipation of and as a part of the federal proceedings.

In his motions to dismiss after trial, and in his arguments to the appellate courts, Bolte maintained that if the services he provided to Koscove constituted the practice of law, whether that conduct constituted the unauthorized practice of law was a matter governed by federal rules and within the exclusive jurisdiction of the federal court system. Relying on *Spanos v. Skouras Theatres Corp.*, 235 F. Supp. 1 (S.D.N.Y., 1964), *aff'd* 364 F.2d 161, 169 (2d Cir. 1965), *cert. denied,* 385 US. 987 (1966), and *Cowen v. Calabrese*, 41 Cal. Rpt. 441 (Cal. App. 1964), Bolte argued that as an out-of-state attorney he was insulated from in-state regulation with respect to all matters "reasonably incident" to the federal case for which he was admitted, and that the Colorado state court in which he never appeared, "would be acting entirely without right and beyond its jurisdiction" if it attempted "to regulate the practice of law in the federal courts or to place any restrictions or limitations upon persons who might appear before federal courts" within Colorado. *See Cowen*, 41 Cal. Rpt. at 443.

Bolte presented these constitutional and jurisdictional issues to the El Paso County District Court before the court rendered its decision, but the court ignored them. Instead, the court deemed the unambiguous Koscove/Bolte investigative services contract to be a contract for legal services, basing that decision on Bolte's conduct pursuant to, and as a part of, his *pro hac vice* admission to the United States District Court for the District

of Colorado. As a result, the state district court declared the contract to be violative of three Colorado state laws relating to the unauthorized practice of law, deprived Bolte of his compensation under the contract, and put his Wisconsin Bar license in jeopardy. *See Dietrich Corp. v. King Resources Co.*, 596 F.2d 422, 426 (1979).

As noted above, Bolte continued to raise these issues after the El Paso County District Court rendered its decision. He filed motions for post-trial relief on April 21, 1998, reiterating the constitutional and jurisdiction issues. The court denied the motion without opinion on May 7, 1998. He appealed to the Colorado Court of Appeals on June 8, 1998, again raising these issues. The Colorado Court of Appeals rejected Bolte's arguments, stating that *Spanos* and *Cowen* were factually distinguishable from his case. (A-8 to A-9).

Bolte sought to have the Colorado Supreme Court address these issues in his petition for writ of certiorari; however, that court limited its review and refused to consider whether a state court has jurisdiction over matters solely within the federal courts but under state law claims. (A-2). As the Colorado Supreme Court is the highest tribunal in the State of Colorado, its decision on the federal jurisdictional issue is final. *See* 28 U.S.C. §1257.

Bolte "pressed" his jurisdiction and constitutional arguments at every opportunity throughout the proceedings in the Colorado state courts. *See Illinois v. Gates*, 462 U.S. 213, 217-19 (1983). The Colorado courts repeatedly rejected Bolte's arguments and, applying Colorado state law, nullified his contract with Koscove and denied him any compensation for his services. Bolte's federal jurisdiction and constitutional issues are ripe for review by this Court.

REASONS FOR GRANTING THE WRIT

State courts usurping federal jurisdiction, state courts interfering with constitutional and federal statutory rights, and state courts applying state statutes in a manner repugnant to federal law -- all are matters involving substantial federal questions. Despite the obvious constitutional implications, neither the Colorado Supreme Court nor the Colorado Court of Appeals nor the El Paso County District Court recognized that the State of Colorado has no jurisdiction or authority to regulate or sanction the actions of out-of-state lawyers involved in cases pending before United States federal courts located in Colorado. Instead, the Colorado appellate courts stood by and allowed the El Paso District Court invoke Colorado state law to declare that Bolte's actions in pursuing Koscove's rights in federal proceedings constituted the unauthorized practice of law in Colorado, rendering his employment contract illegal and denying him the compensation due under that contract. These actions by the Colorado state courts violated the Supremacy Clause of the United States Constitution, violated Bolte's rights under the Privileges and Immunities Clause of the United States Constitution and contravened established caselaw and rules governing the practice of law.

I. THE PRACTICE OF LAW BEFORE FEDERAL DISTRICT COURTS IS GOVERNED BY THE FEDERAL COURTS AND NOT BY STATE RULES.

Under the Supremacy Clause of the United States Constitution, the Constitution and other laws of the United States are the "supreme Law of the Land," U.S. CONST. art. vi, cl. 2. State laws that are "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" are invalid. *Hines v. Davidowitz*,

312 U.S. 52, 67 (1941). More recently, this Court has said, "[w]here a state statute conflicts with or frustrates federal law, the former must give way. (U.S. Const., Art. VI, Cl. 2)." *CSX Transportation v. Easterwood*, 507 U.S. 658, 663 (1993). State court rules regulating attorney conduct are subject to the Supremacy Clause. *See, e.g., Supreme Court of Virginia v. Friedman,* 487 U.S. 59 (1988) (striking down discriminatory admission requirements for non-residents); *Goldfarb v. Virginia State Bar,* 421 U.S. 773 (1975) (invalidating minimum fee schedules); *Sperry v. Florida,* 373 U.S. 379 (1963) (invalidating restraint on practice of patent law by non-lawyers).

Thus, in *In re Snyder,* 472 U.S. 634, 643-45 & n. 6 (1985), this Court rejected the Eighth Circuit Court of Appeals' conclusion that North Dakota's ethical rules governed the conduct of a lawyer appearing before the United States District Court for the District of North Dakota:

> The Court of Appeals stated that the standard of professional conduct expected of an attorney is defined by the ethical code adopted by the licensing authority of an attorney's home state, 734 F.2d, at 336, n. 4, and cited the North Dakota Code of Professional Responsibility as the controlling expression of the conduct expected of petitioner. *The state code of professional responsibility does not by its own terms apply to sanctions in the federal courts. Federal courts admit and suspend attorneys as an exercise of their inherent power; the standards imposed are a matter of federal law. Hertz v. United States*, 18 F.2d 52, 54-55 (CA8 1927).

(Emphasis added).

The Ninth Circuit reached a similar conclusion in *In re Poole*, 222 F.3d 618 (9th Cir. 2000). *Poole* involved whether a member of the Illinois bar who was admitted to practice in the United States Bankruptcy Court for the District of Arizona, but not in the State Bar of Arizona, was an "attorney" for compensation purposes under bankruptcy law. Relying on several decisions of this Court, the Ninth Circuit quickly concluded that Arizona's state laws governing the practice of law did not govern the conduct of an attorney admitted to practice in the federal bankruptcy court. *Id.* at 620.

The *Poole* court began its analysis by noting the distinction between the state and federal court systems: "Admission to practice law before a state's courts and admission to practice before federal courts in that state are separate, independent privileges." *Id.* These two judicial systems "have autonomous control over their officers . . . lawyers included." *Id.* (quoting *Theard v. United States*, 354 U.S. 278, 281 (1957)). Thus, it is the federal court that has the power to admit lawyers to its bar and to discipline those lawyers, *id.* (quoting *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991)(citing *Ex parte Burr*, 9 Wheat. 529, 531 (1824))). "As nearly a century of Supreme Court precedent makes clear, practice before federal courts is not governed by state court rules." *Poole*, 222 F.2d at 622.

Poole was decided in August 2000, after oral arguments in Bolte's case. Although Bolte advised the Colorado Court of Appeals of *Poole* long before it issued its February 15, 2001 decision, that court never mentioned *Poole* in its opinion and instead affirmed the El Paso District Court on grounds that Bolte's case was factually

distinguishable from two other cases Bolte relied upon -- *Cowen v. Calabrese*, 41 Cal. Rptr. 441 (Cal. App. 1964), and *Spanos v. Skouras Theatres Corp.*, 364 F.2d 161 (2d Cir. 1965) (*en banc*), *aff'g* 235 F. Supp. 1 (S.D.N.Y., 1964), *cert. den.*, 385 US. 987 (1966). In doing so, the Colorado Court of Appeals not only misinterpreted *Cowen* and *Spanos*, but also ignored relevant, precedential decisions of this Court and other courts regarding the supremacy of federal law over the practice of law in federal courts.

In *Cowen*, the California Court of Appeals held that California's "State Bar Act," which governed the conduct of lawyers and the unauthorized practice of law in that state, did not apply to an out-of-state attorney appearing in a United States Bankruptcy Court located in California; therefore, the Act did not bar payment of reasonable fees to that attorney. *Cowen*, 41 Cal. Rpt. at 443. Concluding that the attorney's provision of legal advice and appearances were devoted to matters pending in courts of the United States, the Cowen court reaffirmed an earlier California Supreme Court decision holding that a state court has no jurisdiction to regulate the practice of lawyers who appear before federal courts located in that state:

> The State Bar Act and other statutes enacted for the purpose of regulating the practice of law in this state are applicable to our state courts only. The federal courts are governed entirely by federal enactment and their own rules as to admission and professional conduct. This state, should it attempt, and we do not think it has, to regulate the practice of law in the federal courts or to place any restrictions or limitations upon the persons who might appear

> before the federal courts within this state, *would be acting entirely without right and beyond its jurisdiction.*

Id. (quoting *In re McCue*, 211 Cal. 57, 66, 293 P. 47, 51 (1930)) (emphasis added).

The California Supreme Court recently confirmed that the Act did not govern practice in federal courts:

> The Act does not regulate practice before United States courts. Thus, an out-of-state attorney engaged to render services in bankruptcy proceedings was entitled to collect his fee.

Birbrower, Montalbano, Condon & Frank v. Superior Court, 17 Cal.4th 119, 949 P.2d 1, 6, 70 Cal. Rptr. 2d 304, 310 (1998)[1] (citing *Cowen*).

In *Spanos*, an attorney filed a diversity action seeking to collect fees owed to him by a New York theater corporation. Spanos had provided services both in the State of California, where he was licensed, and in the State of New York, where he was not licensed, in connection with an antitrust lawsuit filed in federal court in New York. After concluding that Spanos' conduct constituted the practice of law in New York, the district court determined that New York state law governing the licensure of attorneys and barring recovery of fees for unauthorized

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[1] Although the *Birbrower* court noted that, at the time of its decision, the federal district courts in California required that lawyers seeking admission to those courts must be admitted to and in good standing with the California Bar, *see id.*, no such provision exists in the corresponding local rule for the District of Colorado requiring admission to the State Bar of Colorado.

practice did not apply. The court relied in part on *Sperry v. State of Florida ex rel. The Florida Bar*, 373 U.S. 379 (1963), which held holding that state laws against unauthorized practice of law did not apply to appearances before U.S. Patent Office by layman licensed by that office. *Spanos*, 235 F. Supp. at 13.

On appeal, a panel of the Second Circuit reversed the district court's decision, holding that *Sperry* was limited in scope to the narrow fact situation presented there. The panel also noted that Spanos had never applied for admission *pro hac vice* under the New York federal court's local rules, stating that he would have been entitled to compensation for his work if he had done so. *Spanos*, 364 F.2d at 165-67.

The panel's decision was reversed on reconsideration *en banc*. Writing for the majority, Judge Friendly rejected the idea that Spanos' failure to move for *pro hac vice* admission should bar his claim for fees, noting that there was no reason to suspect such a motion would be denied. *Id.* at 168. He also rejected the idea that if Spanos were admitted *pro hac* vice his compensation would be limited to fees for court appearances *in* the federal court as opposed to all work related to the lawsuit:

> . . . [U]nder 28 U.S.C. 1654, . . . the grant of leave [to appear *pro hac vice*] would have given official recognition to his status as an attorney in the district *for all purposes of the action* and would have insulated him from 270 of the New York Penal Law *with respect to any legal services reasonably incident to the activities the District Court had authorized.* Spanos' contract was thus susceptible of being lawfully performed without his being admitted

> to the New York bar and cannot be considered an illegal bargain.

Id. at 169 (emphasis added) (citations omitted). Judge Friendly went on to state that a client cannot be allowed to render a fee agreement unlawful and unenforceable by firing the lawyer and cutting off the lawyer's "opportunity to validate his status through *pro hac vice* admission . . . ." *Id.*

Faced with these authorities, the Colorado Court of Appeals attempted to distinguish *Spanos* and *Cowen* on factual grounds. The court stated that unlike Spanos, who joined the federal antitrust case after a New York lawyer had filed suit, Bolte performed services (which that court deemed to be legal services) before Koscove retained a Colorado attorney and before a federal suit was filed. That fact, coupled with the fact that the Koscove suit was a diversity action based on state law claims, unlike the federal antitrust suit involved in *Spanos*, led the court to conclude that *Spanos* did not control. (A-8 to A-9). The court took a similar tack with *Cowen*, stating that the lawyer's work related to the bankruptcy claim involved there was exclusively for a federal claim in a federal court, whereas "Koscove's claim was based on a Colorado state law claim, and when Bolte was retained, no litigation was pending, and no decision had been made as to where any potential litigation would be filed." (A-9).

The flaw in this reasoning is the Colorado Court of Appeals' reliance on the nature of the claims rather than on the nature of the court in which those claims were brought. The fact that Koscove's claim *could* have been brought in state court and was filed in federal court only because of diversity jurisdiction is irrelevant to which court and laws govern the attorney's conduct. As the Ninth Circuit stated in a diversity case involving claims arising solely under California law:

> It is quite true that in this diversity action involving a contract presumably made and to be performed in California, the substantive law of California controls. But we do not think that the rule of *Erie Railroad Co. v. Tompkins*, 1938, 304 U.S. 64, 58 S.Ct. 817, 82 L. Ed. 1188, compels the federal courts to permit, in proceedings before those courts, whatever action by an attorney-at-law may be sanctioned by the courts of the state. *When an attorney appears before a federal court, he is acting as an officer of that court, and it is that court which must judge his conduct.*

Cord v. Smith, 338 F.2d 516, 524 (9th Cir. 1964) (emphasis added). Thus, it is the nature of the court, not the nature of the claim, which determines the standards to be applied to the lawyer's actions.

Equally erroneous was the Colorado Court of Appeals' conclusion that the State of Colorado had jurisdiction over the agreement between Koscove and Bolte because both the agreement and some of the services were provided before the federal suit was filed and before Bolte was admitted *pro hac vice* in the federal court. As Judge Friendly stated in the *Spanos* majority opinion *en banc*, if Spanos had been admitted *pro hac vice*, he would have been deemed a lawyer "for all purposes of the action" and would have been insulated from New York law governing attorney conduct with respect to any legal services he provided which were "reasonably incident" to the activities authorized by his admission. *Spanos*, 364 F.2d at 169. Certainly investigative work, legal research and drafting pleadings, all of which are necessary (and mandatory under Rule 11) before filing a lawsuit, are "reasonably incident" to the services and activities authorized by a *pro hac vice* admission once the suit is actually filed.

Indeed, the District of Columbia District Court addressed this very issue in *Shapiro, Lifschitz & Schram v. Hazard,* 24 F. Supp.2d 66 (D.D.C., 1998). *Shapiro* involved a fee dispute between a Washington, D.C. law firm and California clients regarding litigation in a California state court. As part of their counterclaim, the clients alleged that the retainer agreement between them and the law firm was illegal because, at the time the agreement was entered, none of the firm's members had been admitted *pro hac vice* in the California state court system. The clients' position in *Shapiro* was similar to Koscove's position and the Colorado courts' rulings here – even if the lawyer ultimately is admitted *pro hac vice*, the lawyer's pre-admission actions can constitute the unauthorized practice of law in Colorado, subjecting the lawyer to sanctions including the rescission of a contract for services and the denial of all compensation for services.

The *Shapiro* court concluded that these allegations were "easily dismissed." *Id.* at 82. Citing the California Supreme Court's decision in *Birbrower*, the court stated that retainer agreements covering representation in California by out-of-state lawyers are enforceable if the lawyer complies with the requirements of *pro hac vice* admission to the court. *Id.* The court then noted the anomaly of the clients' position that a fee agreement is unenforceable if it is entered *before* the attorney's *pro hac vice* admission:

> In order to be admitted *pro hac vice,* however, an attorney must first have been retained by a client. *See* California Rule of Court 983. Defendants' interpretation of the law would, therefore, put an out-of-state attorney seeking to represent a client in California in an impossible position: he would be unable to enter into a valid retainer

> agreement until he had been admitted *pro hac vice,* but he would also be barred by Rule 983 from being admitted *pro hac vice* until he was retained by a client. Because defendants' claim of rescission rests entirely on this erroneous theory which, if approved, would result in out-of state attorneys being unable to practice law in California, the Court dismisses Count X with prejudice. *See Birbrower,* 17 Cal.4th at 138, 70 Cal.Rptr.2d 304, 949 P.2d 1 (indicating that a fee agreement involving an out-of-state attorney becomes illegal when the attorney performs legal services in violation of § 6125, not when the agreement is signed); *see also Spanos v. Skouras Theatres Corp.,* 364 F.2d 161 (2d Cir.1966) (*en banc*), *cert. denied,* 385 U.S. 987, 87 S.Ct. 597, 17 L.Ed.2d 448 (1966).

Shapiro, 24 F. Supp.2d at 82. *Shapiro* makes it clear that as long as a lawyer's pre-suit services relate to the matter for which he or she is later admitted *pro hac vice*, the fact that the *pro hac vice* admission was sought after the lawyer was retained, after an agreement was entered or after some services were provided does not render the agreement invalid on grounds that the lawyer engaged in the unauthorized practice of law.

Finally, Bolte notes that the Restatement of Law Governing Lawyers recently adopted by the American Law Institute confirms that federal courts have exclusive jurisdiction over the practice of law in those courts:

> A lawyer admitted in one state who is admitted to practice in a United States district court located in another state, but who is not otherwise admitted in the second state, can practice law in the state so long as the practice

> is limited to cases filed in that federal court. Local rules in some few federal district courts additionally require admission to the bar of the sitting state as a condition of admission to the federal court. The requirement is inconsistent with the federal nature of the court's business.

RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS ch. 1, tit. 2, top. B, cmt. g (2000).

It is undisputed that Bolte was admitted *pro hac vice* in Koscove's federal action. In the words of Judge Friendly, that federal court admission deemed Bolte an authorized lawyer "for all purposes" of the action and "insulated" him from state regulation "with respect to any legal services reasonably incident" to that lawsuit. *Spanos*, 364 F.2d at 169. Absent evidence that Bolte's agreement with Koscove or the services he provided extended beyond the scope of the claims alleged in her federal suit against ARCO, the United States District Court for the District of Colorado had exclusive authority and jurisdiction to regulate his conduct. No such evidence exists.

The Colorado state courts' exercise of jurisdiction and entry of judgment against Bolte based on the allegations of unauthorized practice of law in the State of Colorado invaded the exclusive jurisdiction of the federal courts. Bolte respectfully urges this Court to grant a writ of certiorari to address this violation of the Supremacy Clause and to reaffirm the federal courts' inherent authority and power to govern the conduct of the lawyers who appear in those courts.

II. APPLYING THE COLORADO STATUTES GOVERNING THE PRACTICE OF LAW AGAINST BOLTE NOT ONLY VIOLATED THE SUPREMACY CLAUSE, BUT ALSO VIOLATED THE PRIVILEGES AND IMMUNITIES AND CONTRACT CLAUSES OF THE UNITED STATES CONSTITUTION.

The Privileges and Immunities Clause of the United States Constitution provides that the "Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. CONST. art. iv., § 2. Intended to "fuse into one Nation a collection of independent, sovereign States," *Toomer v. Witsell*, 334 U.S. 385, 395 (1948), the Clause has been held to apply "[o]nly with respect to those 'privileges' and 'immunities' bearing on the vitality of the Nation as a single entity." *Baldwin v. Montana Fish & Game Comm'n*, 436 U.S. 371, 383 (1978), *quoted in Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 279 (1984).

The *Piper* Court concluded that the practice of law is such a "privilege" entitled to protection under the Clause. *Piper*, 470 U.S. at 280-82. The Court reached this conclusion not only because of the lawyer's role in the nation's economy, but also because of the lawyer's noncommercial role and duty to champion causes, including representing people who raise unpopular claims. *Id.* Thus, the Court concluded that New Hampshire's requirement that lawyers must be residents of the state in order to be licensed to practice law in the state violated the Privileges and Immunities Clause. *Id.* at 283. Subsequently, this Court issued similar rulings in *Supreme Court of Virginia v. Friedman*, 487 U.S. 59, 61 (1988) (invalidating residency requirement for admission to Virginia State Bar); *Frazier v. Heebe*, 482 U.S. 641, 646-48 (1987) (invalidating local rule of the United States District Court for the District of

Louisiana requiring that all applicants to the district court bar be residents of or maintain offices in Louisiana).

This case presents a unique twist to the *Piper* analysis. Bolte never sought admission to the State Bar of Colorado; he only sought admission *pro hac vice* to the federal district court located in Colorado. No one ever made any allegation that Bolte was unfit to practice law in the federal court system; indeed, the federal court granted his admission. Nonetheless, applying Colorado law governing the practice of members of the Colorado State Bar, the Colorado courts used Bolte's status as an out-of-state attorney admitted *pro hac vice* to deny him right to practice in federal courts located in Colorado and to recover any compensation for the services he provided in connection with Koscove's federal court lawsuit.

The status-based rulings of the Colorado state courts are no different from the residency requirements invalidated in *Piper*, *Friedman* and *Frazier*. Had the lawyers in those cases been residents of the states involved, there would have been no question as to their right to practice law in those states. Similarly, had Bolte been licensed in Colorado, there would have been no question that he was authorized to practice law in either state or federal court there. Instead, because he was not a member of the Colorado Bar, the Colorado courts applied Colorado law in a manner contrary to the Constitution which in effect denied Bolte his right and privilege to practice law in the federal district court in Colorado.

The Colorado courts' application of the Colorado statutes also violates the Contract Clause of the Constitution. Article I, section 10, clause1 provides: "No state shall ... pass any ... Law impairing the obligation of Contracts . . . . Although the adoption of the Fourteenth Amendment and development of caselaw regarding the Due

Process Clause have caused the Contract Clause to fall from use, it remains an enforceable provision of the Constitution. *Allied Structural Steel v. Spannaus*, 438 U.S. 234, 241 (1978). In *Allied Structural Steel*, this Court recognized that to have any meaning at all, the Contract Clause "must be understood to impose *some* limits upon the power of a State to abridge existing contractual relationships, even in the exercise of its otherwise legitimate police power." *Id.* at 242 (emphasis in original).

Applying principles developed over the years, this Court has upheld state laws interfering with contracts where the states' laws "safeguard[ed] the vital interests of [their] people." *Home Building & Loan Ass'n. v. Blaisdell*, 290 U.S. 398, 434 (1934) (noting five factors supporting law, including three factors related to emergency need for legislation). This Court also has invalidated several state laws interfering with private contract rights on grounds that the laws did not justify such interference. *See Allied Structural Steel*, 438 U.S. at 242-44. The *Allied Structural Steel* Court stated that the first inquiry must be "whether the state law has, in fact, operated as a substantial impairment of a contractual relationship," with the "severity of the impairment" measuring the height of the hurdle the legislation [or application thereof] must clear." *Id.* at 244-45.

The rulings of the Colorado state courts applying Colorado law governing the practice of law to Bolte's conduct in connection with Koscove's federal lawsuit did not merely "impair" the contractual relationship between Bolte and Koscove – they obliterated it. Applying the Colorado statutes, the Colorado courts not only voided the agreement between Koscove and Bolte, they deprived him of any compensation at all for the services he provided under the contract, including monies previously paid to him and monies to be paid in the future. (A-17 to A-19).

Bolte recognizes that all states, including the State of Colorado, have an interest in protecting their citizens from harm caused by uneducated and incompetent lawyers and laymen professing knowledge of the law. That interest, however, does not and cannot extend to voiding the contract here, where Koscove hired Bolte, knowing and understanding that he was not licensed in Colorado, to pursue a claim that ultimately was field and recovered in a federal court. Koscove invoked Colorado's laws not because she received poor or incompetent service from Bolte, but instead because doing so provided her an opportunity to reap the fruits of his labor without compensating him for it.

The police powers and laws of the State of Colorado should not be applied in a manner which allows Koscove to discharge her contract obligations without any justification or reason other than Bolte's status. As this Court stated in *Bedford v. Eastern Bldg. & Loan Assoc.* 181 U.S. 227, 241-42 (1901): "We recognize the power of the state to impose conditions upon foreign corporations doing business in the state. We have affirmed the existence of that power many times; but manifestly it cannot be exercised to discharge the citizens of the state from their contract obligations."

CONCLUSION

For over a century, this Court has issued decisions not only affirming the constitutional rights and privileges of attorneys practicing law outside their home states, but also establishing the "rules of the game" which govern such practice. With the notable exception of the Colorado state courts in this case, federal and state courts have followed those precedents and their rules, recognizing that states cannot impose unconstitutional restrictions on the practice of law. As Judge Friendly observed almost forty years ago:

> . . . [W]here a right has been conferred on citizens by federal law, the constitutional guarantee against its abridgment must be read to include what is necessary and appropriate for its assertion. In an age of increased specialization and high mobility of the bar, this must comprehend the right to bring to the assistance of an attorney admitted in the resident state a lawyer licensed by "public act" of any other state who is best thought fitted for the task, and to allow him to serve in whatever manner is most effective, subject only to the valid rules of the courts *as to practice before them*.

Spanos, 364 F.2d at 170 (emphasis added).

Granting certiorari in this case is the only way to ensure and protect the constitutional rights of lawyers and the citizens who wish to hire them. Absent this Court's intervention, the published decision of the Colorado Court of Appeals in this case will be the law of the State of Colorado, subject to any modification by the Colorado Supreme Court on the limited issue it accepted for review. These decisions of the Colorado state courts -- ignoring over

a century of precedent, trespassing into the jurisdiction of the federal court system and denying Bolte's constitutional rights -- are flagrant violations of the rules of American jurisprudence.

The law of the State of Colorado was clear: courts are obligated to decide issues in accord with controlling legal standards. *See Buckmiller v. Safeway Stores, Inc.*, 727 P.2d 1112, 1115 (1986). Yet, the El Paso District Court ignored the law, including the holdings of this Court, and exercised jurisdiction over Koscove's claims. Underlying all of the issues Bolte presents is a basic question: must trial courts across this land apply the law as it exists, or may they determine what the law is themselves?

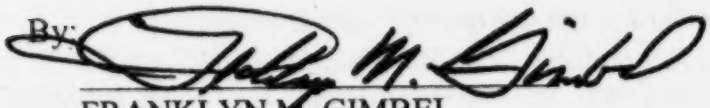
In the "game" of jurisprudence, this Court is the ultimate referee. Bolte's petition for a writ of certiorari presents this Court with the opportunity to "blow the whistle" to assess a penalty against the Colorado state courts for their failure to follow the rules of the game.

For these and all of the foregoing reasons, Petitioner Richard Bolte respectfully urges this Court to grant his petition for a writ of certiorari and to review the rulings of the state courts of Colorado. In the event the petition is granted, Bolte prays that those rulings be reversed and that the case be remanded for accounting of the funds due him.

Dated this 12th day of November, 2001.

Respectfully submitted,

GIMBEL, REILLY, GUERIN & BROWN

By: 

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NO.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2001

RICHARD BOLTE,

Petitioner,

v.

CAROLE KOSCOVE,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE COLORADO SUPREME COURT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

ANNOUNCEMENTS
COLORADO SUPREME COURT

Monday, August 20, 2001

PETITIONS FOR WRIT OF CERTIORARI

* * *

No. 01SC221
Court of Appeals No. 98CA1099 (02/15/01)
RICHARD BOLTE, Petitioner,
v.
CAROL KOSCOVE, Respondent.
Petition for Writ of Certiorari GRANTED. EN BANC.

SUMMARY OF ISSUE:

Whether admission to a court *pro hac vice* protects the admitted attorney from claims of unauthorized practice of law only for the period of time following the *pro hac vice* admission.

DENIED AS TO ALL OTHER ISSUES.

JUSTICE KOURLIS would also grant as to the following issue:

Whether a Colorado state court has jurisdiction to hear a claim of unauthorized practice of law, when the alleged conduct took place solely within the federal courts, but under state law claims.

Koscove v. Bolte

30 P.3d 784

Colo.App.,2001.

Opinion by Judge NIETO.

Defendant, Richard Bolte, appeals the judgment entered against him and in favor of the plaintiff, Carol Koscove, after a trial to the court. The judgment was based on attorney fees paid to Bolte by Koscove pursuant to an unenforceable agreement. We affirm the judgment.

Bolte is an attorney licensed in Wisconsin but not in Colorado, a fact that Koscove was aware of at all times pertinent to this case. At the time Bolte first contacted Koscove, he was not actively engaged in the practice of law in Wisconsin or elsewhere. All contacts between Bolte and Koscove and all work Bolte performed took place in Colorado. Bolte lived in Colorado during the time he was involved with this case.

In November 1994, Koscove entered into an agreement with Bolte whereby Bolte was to investigate and pursue Koscove's claims of royalty payments due her under a mineral royalty lease with an oil company. Bolte's compensation for his services under the agreement was based on a percentage share of the royalties recovered.

Without associating with a Colorado attorney, Bolte began working on Koscove's behalf, and he reported directly to her. Bolte investigated Koscove's claim and determined that royalties had been underpaid. In April 1995, Koscove retained a Colorado attorney, who is not a party to this action, to assist her in the contemplated action against the oil

company. The Colorado attorney did not supervise Bolte's work, which continued after the Colorado attorney was retained. However, before Koscove could file her suit against the oil company, the company sued her in the federal district court.

The Colorado attorney answered and counterclaimed for the royalties due. In his engagement letter, the Colorado attorney referred to Bolte as Koscove's "local counsel," and he listed Bolte in the pleadings as "of counsel." In January 1996, Bolte was admitted *pro hac vice* in the federal court.

Bolte did substantial work on the case, and through his and the Colorado attorney's efforts, a substantial amount was recovered for unpaid royalties. Pursuant to their agreement, Koscove paid Bolte his percentage share of the money recovered.

Thereafter, Koscove brought this action against Bolte to recover the fees paid to him, claiming that they were attorney fees and that he was not entitled to the fees because he was not licensed to practice law in Colorado. She also claimed that Bolte had failed to comply with rules governing attorney contingent fee agreements contained in Chapter 23.3 of Colorado Rules of Civil Procedure. The trial court agreed with Koscove and entered judgment in her favor for all the fees paid to Bolte. This appeal followed.

I.

Bolte does not dispute that he and Koscove entered into an agreement for services, but Bolte asserts that the agreement was not a contract for legal services. We are not persuaded.

The primary goal of contract interpretation is to determine and give effect to the intent of the parties. The interpretation of a contract is a question of law. Therefore, our review is *de*

novo. Ad Two, Inc. v. City & County of Denver, 9 P.3d 373 (Colo. 2000).

A review of the written agreement and the evidence of the conduct of the parties before and after its execution leads us to conclude, as did the trial court, that it was a contract for legal services.

The record reveals the following facts. Bolte was an attorney but not licensed in Colorado. It was his expertise as a lawyer that led Koscove to enter into the agreement for services; Bolte had no expertise in the business of extracting oil and gas, or in oil and gas litigation.

The parties' intention that Bolte was to provide legal services is further made clear by the first agreement proposed by Bolte but rejected by Koscove. In that proposal, Bolte suggested that he be given an ownership interest in the property "so that Bolte, as a part owner, can provide advice and do work that may have legal ramifications without violating law or ethics." Bolte testified that he suggested this arrangement so "that I could go into court and represent or protect my interest, whatever it was, my token interest. That's not granting--representing anyone else, just representing mine."

When the Colorado attorney entered the case, and even after Bolte was admitted *pro hac vice* in the federal district court, Bolte continued to operate under the same agreement. The Colorado attorney testified that he considered Bolte to be Koscove's lawyer from the beginning.

The agreement does not make specific reference to legal services, but it is replete with phrases that suggest that was its purpose. Bolte was required to "investigate, examine, copy, analyze and interpret" documents relating to the mineral lease. He was to "pursue" the payments due

Koscove. Bolte's fees were based on a percentage share of royalties that were increased or enhanced, a provision almost indistinguishable from an attorney's contingent fee arrangement. Fees for future royalties were to commence "after payment, settlement, or judgment for past and present sums due." The agreement remained in force until "a settlement is reached or litigation is completed."

When the agreement is read against the background of Bolte's status as a lawyer and his lack of expertise in the business of extracting oil and gas, the fee agreement negotiations between the parties, the contemplation of litigation, and the work performed by Bolte, the trial court's determination that the agreement is a contract for legal services is fully supported by the record. Based on our review, we agree with the trial court's determination.

II.

Bolte also asserts that his performance under the agreement did not constitute the practice of law in Colorado. We disagree.

While acknowledging the difficulty of giving an all-inclusive definition of the practice of law, the supreme court has defined it as follows:

> We believe that generally one who acts in a representative capacity in protecting, enforcing, or defending the legal rights and duties of another and in counseling, advising and assisting him in connection with these rights and duties is engaged in the practice of law.

Denver Bar Ass'n v. Public Utilities Commission, 154 Colo. 273, 279, 391 P.2d 467, 471 (1964). *See also* C.R.C.P. 201.3(2).

The trial court found that Bolte had engaged in the practice of law in this matter. If the record supports the trial court's findings of fact, they will not be disturbed on review. *Page v. Clark,* 197 Colo. 306, 592 P.2d 792 (1979).

Review of the record reveals that Bolte analyzed Koscove's lease with the oil company and gave her his opinion of its meaning. He also expressed opinions about legal theories for recovery of damages and discouraged pursuit of at least one theory. He represented Koscove's interests during his communications with the oil company. He drafted a demand letter to the oil company in which he stated that the letter was a "single last effort to resolve issues short of litigation." After Koscove retained a Colorado lawyer to respond to the suit filed by the oil company, and before Bolte was admitted *pro hac vice* in the federal district court, Bolte drafted several versions of Koscove's counterclaims and other pleadings, which he sent to the Colorado lawyer. He also sent memorandums to the Colorado lawyer on a variety of legal topics. When the Colorado attorney filed Koscove's response in the federal court litigation, he listed Bolte "of counsel."

Thus, there is substantial evidence in the record to support the trial court's finding that Bolte engaged in the practice of law. Accordingly, that finding will not be disturbed on review.

Bolte also contends that the work he did prior to his *pro hac vice* admission in the federal court could lawfully be done by a nonlawyer. Specifically, he argues that the fact investigation he did before the entry of the Colorado lawyer and the documents he prepared for the Colorado lawyer were all permitted activities. While we agree that, in some circumstances, fact investigation and legal drafting could be lawful activities by a nonlawyer, those same functions are appropriate and typical activities for a lawyer. Taken in the full context of Bolte's relationship with Koscove, the trial

court concluded that his actions constituted the practice of law. As stated above, this conclusion is supported by the record.

The trial court found that the agreement "in part" required the performance of legal services and what Bolte did was "in part" legal service to Koscove. Bolte might have been able to establish that some of his actions were nonlawyer activities and thus have made a case for compensation for those particular activities. However, he made no attempt in the trial court to separate his actions into lawyer and nonlawyer activities, and we will not consider the issue now.

III.

Bolte next contends that, if his actions did constitute the practice of law, Colorado has no jurisdiction over that practice because he was subsequently admitted *pro hac vice* in the federal district court where the litigation took place. Again, we do not agree.

Bolte argues that only the federal courts have authority to regulate the practice of law in matters before them. He primarily relies on *Spanos v. Skouras Theatres Corp.*, 364 F.2d 161 (2d Cir.1966). There, a California lawyer was retained by a New York corporation to work with New York lawyers on a federal antitrust action that the corporation contemplated filing in the federal district court in New York. The lawyer participated in the litigation that was filed in federal district court, but he was never admitted to practice law in New York. When the corporation refused to pay his fee, the lawyer brought suit. The corporation claimed he was not entitled to attorney fees because he was not admitted to practice law in New York. The court held that state law cannot prohibit a citizen from engaging an out-of-state lawyer to work in association with a local lawyer on a federal claim.

However, the facts here do not bring this case within the holding of *Spanos*. The case here is different in the following respects. Bolte entered into an agreement to provide legal services to Koscove, a Colorado citizen, on Colorado state law claims. He investigated the claims, advised Koscove, and made settlement demands on the oil company, all before the entry of a Colorado lawyer into the case. Further, at the time Bolte began his representation, there was no federal case. The case could have been filed in Colorado courts. If an action on Koscove's behalf had been filed in the federal courts, it would have been a diversity action, rather than one based on a federal claim. Bolte himself testified that "I had no idea what court it would be, whether it would be Colorado state, federal, could have been Texas from what I was seeing." Under these circumstances, we do not consider *Spanos* to be controlling.

Bolte also relies on *Cowen v. Calabrese*, 230 Cal.App.2d 870, 41 Cal. Rptr. 441 (1964), but this case is also distinguishable. In *Cowen*, the attorney was retained to work on a bankruptcy matter that was pending before the federal courts. Thus, the lawyer's engagement was exclusively for work on a federal claim in a federal court. Here, Koscove's claim was based on a Colorado state law claim, and when Bolte was retained, no litigation was pending, and no decision had been made as to where any potential litigation would be filed.

These circumstances, which distinguish this case from the authorities relied upon by Bolte, also lead us to conclude that the trial court had jurisdiction to adjudicate the enforceability of the agreement. Bolte provided legal services to Koscove on Colorado state law claims before any decision was made to file a case in federal court and long before he was admitted *pro hac vice* in the federal court. He continued to operate under the same agreement after his *pro hac vice* admission. We do not suggest that the federal court does not have

jurisdiction to decide whether, under federal law, Bolte is entitled to fees for his work before that court. But that fact, if true, does not deprive Colorado courts of jurisdiction over the agreement that the parties entered into long before the jurisdiction of the federal court was invoked.

Since Bolte was not licensed to practice law in Colorado, § 12-5-115, C.R.S.2000, governs Koscove's claim to recover attorney fees she paid to him. Section 12-5-115 provides:

> If any unlicensed person receives any money ... as a fee or compensation for services rendered ... by him as an attorney or counselor-at-law within this state, all money so received by him shall be considered as money received to the use of the person paying the same and may be recovered, with costs of suit, by an action for money had and received.

The trial court found that Bolte had entered into an agreement to provide legal services and had in fact provided legal services; we have affirmed those findings. Thus, the trial court correctly applied § 12-5-115 and awarded Koscove judgment against Bolte for all the fees paid.

IV.

Bolte also contends that the trial court erred by failing to dismiss Koscove's complaint. We disagree.

Koscove testified in her deposition that certain documents supported her allegation that Bolte had engaged in the practice of law. Later, she changed her answer to "I have no position on it." In her testimony on cross- examination during trial, Koscove said that it had "always been my interpretation" that the documents were evidence of the practice of law. Bolte first argues that the complaint should have been dismissed at the end of Koscove's case because

her shifting position resulted in a failure of the evidence to support her claim that Bolte had practiced law. The trial court denied the motion, finding that other evidence supported the claim.

In deciding a motion to dismiss or a motion for directed verdict made at the close of a party's case, the trial court must view the evidence in the light most favorable to the non-moving party. The court must also give the non-moving party the benefit of all reasonable inferences that can be drawn from the evidence. *Herrera v. Gene's Towing,* 827 P.2d 619 (Colo.App.1992). When viewed from this perspective, the record supports the trial court's denial of the motion.

Bolte also argues that Koscove's changing position was a manipulation of the discovery process, and therefore, the trial court should have dismissed the complaint as a sanction.

Sanctions relating to discovery are committed to the discretion of the trial court and will not be disturbed absent an abuse of discretion. *J.P. v. District Court,* 873 P.2d 745 (Colo.1994). A sanction should be commensurate with the seriousness of the violation. Litigation-ending sanctions should be used only in extreme circumstances. *Nagy v. District Court,* 762 P.2d 158 (Colo.1988).

The record shows that the documents referred to above were disclosed and made available to Bolte during discovery. He was permitted to cross-examine Koscove on her statements concerning the documents. The changes Koscove made to the deposition were permitted by C.R.C.P. 30(e). Under these circumstances, we perceive no abuse of discretion.

Our resolution of this issue makes it unnecessary for us to address the application of the rules governing contingent fees in Chapter 23.3 of Colorado Rules of Civil Procedure. Nor is

it necessary to address Koscove's contention that the appeal should be dismissed because of Bolte's failure to comply with post-judgment discovery requests under C.R.C.P. 69.

Judgment affirmed.
Judge CASEBOLT and Judge DAILEY concur.

DISTRICT COURT, EL PASO COUNTY, COLORADO
Case No. 96CV2233, Division 8

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

CAROL KOSCOVE, Plaintiff,

v.

RICHARD BOLTE Defendant.

This matter came before the Court for trial on November 19, 1997 and November 20, 1997. At that time the Court heard the testimony of various witnesses. Based upon that testimony, the Court finds the following:

Plaintiff is the owner certain real estate in Huerfano County, Colorado. The real estate has been leased to ARCO Oil Company for the purpose of extracting CO2 and other minerals from the property and Plaintiff is entitled, by virtue of the lease, to receive royalties. Sometime in 1990, Plaintiff began to suspect that ARCO was not paying the correct amount of monies due Plaintiff pursuant to the lease. In the fall of 1994, after talking with several other individuals about the matter, Plaintiff sought the assistance of Defendant in pursuing the issue of whether ARCO was paying the proper amount to Plaintiff. Plaintiff knew at the time she talked with Defendant that Defendant was a lawyer. Plaintiff also knew that Defendant was not licensed to practice law in Colorado.

Defendant agreed to assist Plaintiff in the matter with ARCO and the parties signed a contract on November 22,

1994. At the time Plaintiff and Defendant entered into the contract, Defendant was not licensed nor otherwise authorized to practice law in Colorado. Defendant was a lawyer licensed in Wisconsin and in fact, had received his Wisconsin license in 1961. He had no special expertise in the area of oil and gas litigation. Additionally, there was no litigation actually pending, and no Colorado attorney had been hired by Plaintiff to represent her in her complaints against ARCO.

The contract signed by the parties required the Defendant to investigate, examine, copy, analyze and interpret documents pertaining to the mineral extraction and royalty payments. The terms of payment between Plaintiff and Defendant are set forth on Page 3 in Volume 1 of the trial exhibits. In addition to a set amount agreed to between Plaintiff and Defendant for Defendant's time, computer items and a vehicle for Defendant to use in pursuing Plaintiff's claims against ARCO, the contract also required Plaintiff to pay to Defendant certain additional amounts of money contingent upon Plaintiff and ARCO reaching a settlement or in the event of a judgment after litigation.

Upon the signing of the contract, Defendant began to investigate the leases. He also performed legal research, crated legal memoranda which he provided to Plaintiff, advised Plaintiff as to her potential claims for relief and potential damages, and generally advised her of the course of action to take regarding her complaint with ARCO. During the period from November 22, 1994 through April 6, 1995, Defendant performed these services without the benefit of having been admitted *pro hac vice* in Colorado and without associating with duly-licensed Colorado counsel.

On April 7, 1995, the Plaintiff and George Mueller, an attorney with a sub-specialty in oil and gas litigation entered into an attorney-client relationship in which Mr.

Mueller agreed to represent Plaintiff in United States District Court litigation with ARCO.

After Plaintiff formally engaged Mr. Mueller, Defendant continued to investigate Plaintiff's potential claims against ARCO. He also continued to perform legal research, draft pleadings and advise Plaintiff in legal matters involving ARCO. Plaintiff and Defendant did not enter into a separate contract to compensate Defendant for the work he performed after Plaintiff hired George Mueller. Additionally, he engaged in settlement negotiations with ARCO. Defendant was not supervised by Mr. Mueller and Mr. Mueller believed Defendant to be lead counsel in the litigation.

Before Plaintiff hired George Mueller, she paid Defendant in accordance with the contract. After Plaintiff hired George Mueller and up to the time the dispute arose about the contingency regarding future royalties, Plaintiff paid Defendant in accordance with the terms of the November 22, 1994 contract. At no time relevant to this lawsuit has George Mueller or his law firm paid Defendant, nor did Mr. Mueller or his law firm hire Defendant to act as a consultant to them. At all times relevant to this Complaint, Defendant acted pursuant to the November 22, 1994 contract between Plaintiff and Defendant.

On January 5, 1996, Defendant was admitted *pro hac vice* by the United States District Court for the District of Colorado.

On March 28, 1996, ARCO paid Plaintiff $1,883,816.13 as a result of one of Plaintiff's claims in the United States District Court and Plaintiff paid Defendant his percentage in accordance with the November 22, 1994 contract. Defendant received over $300,000 from Plaintiff as a result of the March 28, 1996 payment by ARCO to

Plaintiff. Plaintiff has at no time been dissatisfied with the work Defendant performed for Plaintiff. Defendant withdrew from further representation of Plaintiff in the AR litigation because of a dispute between Plaintiff and Defendant over the contingency in the November 22, 1994 contract requiring Plaintiff to pay a percentage of future royalties. This lawsuit followed.

On September 18, 1996, Plaintiff filed an Amended Complaint alleging that the November 22, 1994 contract between Plaintiff and Defendant was a contract for legal services, and that in fact Defendant performed legal services under the contract when he was not licensed or otherwise authorized to do so. Further, Plaintiff claims that because this is an agreement for legal services and the contract does not substantially comply with Rule 4 of Chapter 23.3, C.R.C.P., the Plaintiff is not bound by the contract. Plaintiff requests that the compensation she has paid Defendant be returned under C.R.S. Section 12-5-115 and has agreed to waive the statutory penalty of treble damages.

Defendant denies that the services performed by him pursuant to the contract constitute the unauthorized practice of law. Defendant further counterclaimed for breach of contract and defamation.

The Court dismissed the defamation claim at the close of the Defendant's evidence for failure of Defendant to present a *prima facie* case of defamation.

For reasons stated hereafter, the Court finds for the Plaintiff and against the Defendant on all remaining issues in the case.

Defendant claims in the first instance that he was not practicing law. The Court disagrees with Defendant.

Generally, one who acts in a representative capacity in protecting, enforcing or defending the legal rights and duties of another and in counseling, advising and assisting him in connection with these rights and duties is engaged in the practice of law. *Denver Bar Association v. Public Utilities Commission*, 154 Colo. 273, 391 P.2d 467 (1964). Preparing legal motions, notices and other memoranda for individuals and advising persons as to what their rights and obligations are is practicing law. *See, Unauthorized Practice of Law Committee v. Richard O. Grimes*, 654 P.2d 822 (Colo. 1982). That is precisely what Defendant did here: counsel, advise and assist Plaintiff with her legal rights against ARCO.

Defendant then claims that to the extent he was practicing law, it was not the unauthorized practice of law because under *Spanos v. Skouras Theatres Corporation*, 364 F.2d 161, on reconsideration *en banc* (4th Cir. 1966), he was authorized to do so even though he did not have a license to practice law in Colorado. The Court finds that *Spanos v. Skouras*, *supra*, is inapplicable to this lawsuit because in *Spanos* the out-of-state lawyer had been invited by the Plaintiff to work in association with a local attorney to work on a federal claim. Such is not the case here. At the time of the signing of the contract, there was no federal claim filed or necessarily anticipated. In fact, part of what Defendant did is advice Plaintiff on whether to file a lawsuit, and whether to file in state court or in federal court. Further, Plaintiff did not invite Defendant to work on her claims involving ARCO in conjunction with a licensed Colorado lawyer and in fact at the time of the signing of the contract between Plaintiff and Defendant, there was no Colorado counsel involved. For almost five months (November 22, 1994 through April 6, 1995), Defendant practiced law in Colorado without the benefit of either a license to do so or the association with local counsel. Additionally, the holding in *Spanos* was specifically limited to cases involving federal claims or

defenses as opposed to cases such as this involving jurisdiction based upon diversity of citizenship.

Having concluded that Defendant was committing the unauthorized practice of law, the Court moves on to the issue of whether he is precluded from recovering under the terms of the contract.

The contract required the Defendant to *analyze, interpret and pursue* Plaintiff's claims against ARCO. The Court has found that what Defendant did in part under the contract and what the contract required is legal services that Defendant was not authorized to perform. A contract, entered into by a person in the course of an occupation or business in which he is engaged without taking out a license as required by law, is void and unenforceable where the statute or ordinance expressly vitiates such contracts, or where it expressly prohibits the carrying on of such occupation or business without a license even though it does not expressly declare such contracts to be void. *Benham v. Hyde*, 122 Colo. 233, 221 P.2d 1078 (1950).

C.R.S. Section 12-5-101 states:

> No person shall be permitted to practice as an attorney or counselor-at-law or to commence, conduct, or defend any action, suit, or plaint in which is not a party concerned in any court of record within this state, either by using or subscribing his own name or the name of any other person, without having previously obtained a license for that purpose from the supreme court.

C.R.S. Section 12-5-115 states:

> If any unlicensed person receives any money or any species of property as a fee or compensation for

> services rendered or to be rendered by him as an attorney or counselor-at-law within this state, all money so received by him shall be considered as money received to the use of the person paying the same and may be recovered with costs of suit by an action for money had and received.

Therefore, under C.R.S. Sections 12-5-101 and 12-5-115, Defendant is not allowed to keep the money paid to him by Plaintiff pursuant to the contract,

Additionally, pursuant to Rule 6 of Chapter 23.3, C.R.C.P., Defendant is not entitled to keep the money Plaintiff has paid him. The contract by which Defendant was paid for these legal services was in part a contingency fee contract for legal services. The contract was in part a contingency fee contract because the contract required Plaintiff to pay Defendant a certain amount of money contingent upon any settlement with ARCO and any increase in royalties received by Plaintiff as a result of Defendant's work. In fact, that clause in the contract is what gave rise to the dispute between Plaintiff and Defendant. Rule 6 of Chapter 23.3, C.R.C.P. requires that certain enumerated items be placed in a contingency fee agreement. As a result of the legal and non-legal work the Defendant did in connection with the contract entered into between him and Plaintiff requiring him to interpret, analyze and pursue Plaintiff's claim against ARCO, Plaintiff paid Defendant a substantial sum of money. This money, however, was paid pursuant to a contingency fee contract which is not in substantial compliance with all of the provisions of the rule. Specifically, the contract is not in substantial compliance with Rule 6 of Chapter 23.3, C.R.C.P. because Defendant did not disclose the return of other types of the arrangements, Defendant did not disclose the nature of specially awarded attorney fees, Defendant only partially disclosed the nature and estimated amount of expenses, Defendant did not

disclose the potential for an award of costs and attorney fees to the opposing party, Defendant did not disclose what is meant by associated counsel, Defendant did not disclose what is meant by subrogation. Therefore, Defendant is not allowed to recover. *Elliott v. Joyce*, 889 P.2d 43 (Colo. 1994). Further, the contract is silent with respect to the parties' obligations should they mutually decide to terminate the Agreement, or should Defendant end the contract. Therefore, Defendant is not entitled to recover under the theory of *quantum meruit*. *Elliott v. Joyce, supra.*

Accordingly, judgment is hereby entered in favor of Plaintiff and against Defendant in the amount of $388,013.23 (the amount admitted in the Defendant's Answer as having been paid by Plaintiff to Defendant under the terms of the contract), plus interest and costs.

DATED this 6th day of April, 1998.

BY THE COURT:

s/ _____

Theresa M. Cisneros
District Court Judge

[CONTRACT]

The parties hereto, Carol Koscove (Koscove) and Richard Bolte (Bolte), on this 22nd day of November 1994, do state that:

Whereas Koscove is the recipient of mineral royalty payments from her ownership of land in the Huerfano Park/Sheep Mountain area in southern Colorado and desirous of ascertaining that the payor, Arco Oil Company, is properly extracting, metering, measuring, calculating and remitting for the CO2 and other minerals taken out of her property, and

Whereas she wishes to employ Bolte to investigate and verify the accuracy of said royalty payments.

Now, therefore, it is agreed as follows:

1. Koscove hereby employs Bolte to investigate, examine, copy, analyze, and interpret whatever documents and records in whosever's possession that pertain to said mineral extraction and royalty payments and pursue the proper payment thereof. She will give him the written authority to do so on her behalf.

2. Bolte will henceforth devote time sufficient to make said determination of payment accuracy and pursue the same.

3. Koscove is to henceforth pay Bolte the sum of $75,000.00 to cover his time, computer hardware and software and accessory purchases, and vehicle acquisition, $25,000.00 of which shall be paid upon the signing hereof, the balance to be placed in an escrow account withdrawable by Bolte at the rate of $5,000.00 per month beginning on January 1, 1993. The parties will share Bolte's out of town travel, lodging, food, supporting business expenses, and retained expert costs 85% by Koscove and 15% by Bolte.

4. That portion of any royalties increased or enhanced after the efforts of Bolte shall be shared 80% by Koscove and 20% by Bolte. After payment, settlement, or judgment for past and present sums due, Bolte's share in future royalties shall be reduced to10%. From any of said royalties, Koscove

shall be entitled to a return of 85% of the $75,000.00 advanced to Bolte, provided, however, that no amount so returned shall be more than 15% of each sum due Bolte from time to time.

5. This agreement shall remain in force until it is determined that Arco is paying the proper amount, a settlement is reached, or litigation is completed, whichever shall occur first, provided, however, that royalty obligations shall continue in force thereafter until fully satisfied.

6. This agreement shall be binding upon the heirs, successors and assigns of the parties.

Agreed and executed on the date indicated hereinabove.

s/_____
Carol Koscove

s/_____
Richard Bolte